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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ROBERT BADELLA, individually and on behalf) Case No.: 3:10-cv-03908-
of all persons similarly situated, et al.,) CRB
)
v.) **PLAINTIFFS' SECOND
MOTION FOR LEAVE
TO FILE A FIRST
AMENDED
COMPLAINT**
DENIRO MARKETING, LLC,)
a California limited liability company, et al.,)
Defendants.)

Local Rule 7-11

1 **I. SUMMARY OF THE ARGUMENT**

2 Plaintiffs filed the original Complaint in this matter on August 31, 2010.
3
4 (Docket No. 1). Plaintiffs filed a motion to amend the Complaint on September
5
6 12, 2011 (Docket No. 64). Plaintiffs withdrew this motion on September 23, 2011
7 (Docket No. 71). Plaintiffs are seeking, again, to file their first amendment to the
8
9 Complaint. The attached amendment withdraws the claims and cause of action
10 contained in the original Complaint which have been settled or dismissed. The
11 amendment also adds two additional causes of action; one for false advertising
12 under the Lanham Act, Section 43(a), the second for violating California's
13 restrictions on dating service contracts codified in CAL. CIVIL CODE § 1694.
14
15 See Proposed First Amended Complaint, Garbarini. Decl. Ex. A. This is a
16 reasonable request, particularly in light of the fact that Defendants will not be
17 prejudiced with respect to discovery or other matters. In fact, the Appearing
18 Defendants have yet to provide a single document, even though documents are
19 now more than **90 days late.**
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25 **II. PLAINTIFFS SHOULD BE ALLOWED TO FILE THE PROPOSED**
26 **FIRST AMENDED COMPLAINT**

27 The Ninth Circuit interprets Fed.R.Civ.P. 15(a) broadly, requiring that leave
28 to amend be granted with "extraordinary liberality". *Phoenix Solutions, Inc. v.*
29 *Sony Elecs., Inc.*, 637 F. Supp. 2d 683 (N.D. Cal. 2009). The Ninth Circuit
30
31

1 considers five factors in assessing the propriety of a motion for leave to amend:
 2 (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of
 3 amendment and (5) whether plaintiff has previously amended his complaint. *King*
 4
 5 *v. Hedgpeth*, 2010 U.S. Dist. LEXIS 34305 (E.D. Cal.).

6
 7 **A – NO BAD FAITH** - There is nothing “manipulative” here, rather
 8 Plaintiffs “straightforward tactical decision”, is not considered as bad faith. See
 9
 10 *Gardner v. Blue Bird Corp.*, 2006 U.S. Dist. LEXIS 54375 (N.D. Cal.) (quoting
 11
 12 *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487 (9th Cir. 1995)).

13
 14 **B - NO UNDUE DELAY.** Even if the Court finds undue delay, the Ninth
 15 Circuit has determined that “undue delay by itself is insufficient to justify denying
 16 a motion to amend under Rule 15”. *McAfee v. California*, 2008 U.S. Dist. LEXIS
 17 120600 (E.D. Cal. Apr. 28, 2008) (quoting *Bowles v. Reade*, 198 F.3d 752, 758
 18 (9th Cir. 1999)).

21 Any delay in this case is solely due to the Defendants. Garbarini Decl. at ¶¶
 22
 23 5-10. The Appearing Defendants’ Counsel, Gary Kaufman, has engaged in a
 24 pattern and practice to thwart the prosecution of this case at every turn. The
 25 Appearing Defendants answered the Complaint on March 17 and March 21, 2011
 26 (Docket Nos. 42-45), however, the Appearing Defendants’ Counsel, refused to
 27 have a Rule 26(f) conference, or allow discovery to proceed, until the foreign
 28 RICO Conspirator Piranha New Media was served. See Garbarini Decl. Ex. B.
 29
 30
 31

1 It was not until May 17, 2011 that Defendants' Counsel Gary Kaufman
2 would agree to sit for a Rule 26(f) conference. Garbarini Decl. at ¶ 7. On that
3 same day, Plaintiff served, via Federal Express, Document Requests and
4 Interrogatories on the Answering RICO Conspirators. Garbarini Decl. at ¶ 8.
5 Responses and Objections as well as responsive documents were due on June 18,
6 2011. To date, no Appearing Defendant has provided a single document pursuant
7 to the Requests. Garbarini Decl. at ¶ 10.

8 **C – NO PREJUDICE WILL OCCUR** - “It is the consideration of
9 prejudice to the opposing party that carries the greatest weight” in an analysis of
10 whether to grant a motion to amend. *Gulcynski v. Fid. Nat'l Title Group*, 2007 U.S.
11 Dist. LEXIS 30829 (S.D. Cal. Apr. 23, 2007) (quoting *DCD Programs, Ltd. v.*
12 *Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). Prejudice has been found where “the
13 parties have engaged in voluminous and protracted discovery” and where
14 “expense, delay, and wear and tear on individuals and companies is show.”
15 *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794 (9th Cir. Cal. 1991). Absent prejudice, or a
16 strong showing of any of the remaining factors, there exists a presumption under
17 Rule 15(a) in favor of granting leave to amend. *Gulcynski* at 12.

18 There has been NO MEANINGFUL DISCOVERY, as of the date of this
19 motion, Defendants' have failed to meaningfully engage in discovery and cannot
20

1 possibly be prejudiced under these circumstances. More, this does not impact the
 2 current motion to certify the class pursuant to Rule 23 in any manner.
 3

4 **D – AMENDMENT IS NOT FUTILE.** An amendment is deemed futile
 5 where the plaintiff would be unable to prove facts under the amended complaint.
 6 *Qualcomm Inc. v. Motorola Inc.*, 989 F. Supp. 1048 (S.D. Cal. 1997). The Court,
 7 however, is not to inquire whether Plaintiffs have stated facts entitling them to
 8 relief, but rather whether plaintiffs *could* state such facts. *Qualcomm* at 1051.
 9 Additionally, an amended complaint is futile “only if it would clearly be subject to
 10 dismissal.” *Hinshaw v. Vessel, M/V Aurora*, 2006 U.S. Dist. LEXIS 32182 (N.D.
 11 Cal. May 12, 2006) (quoting *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d
 12 1081, 1086 (S.D. Cal. 2002)).

13 Defendants are alleged to operate a worthless dating service that they
 14 advertise extensively as genuine. This is a fairly clear violation of Section 43(a),
 15 and an amendment for false advertising is not futile. The Complaint more than
 16 adequately lays out a road-map for a false advertising violation. Further, the
 17 Defendants have colluded to offer dating services, albeit fraudulent and defective
 18 services. Under Cal. Civil Code § 1694.4(a) and (b), they had an obligation to
 19 allow users 3 days to request a refund for the bogus services; they did not.
 20

21 **E – PLAINTIFFS HAVE NOT PREVIOUSLY AMENDED.** The
 22 Court’s discretion in determining whether to grant a motion to amend a complaint
 23

1 is also influence by whether Plaintiffs have previously amended the complaint.
2
3 *Taback v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 68981 (N.D. Cal. Sept. 14,
4 2006). Even in a situation where plaintiff has previously amended, the Court may
5 still “feel it appropriate to allow plaintiff” additionally amendment. *Brown v.*
6 *Rumsfeld*, 211 F.R.D. 601 (N.D. Cal. 2002). Plaintiff has not previously sought to
7 amend.
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9

10 Plaintiffs previously sought to amend their complaint on September 12,
11 2011, however, this motion was withdrawn on September 23, 2011. This would be
12 Plaintiffs first amendment to the Complaint,
13
14

15
16 Dated: September 30, 2011

17 /s/ Richard Garbarini
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